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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/732,726	12/10/2003	William T. Ball	P06239US1-152	2017
34082	7590	10/24/2005	EXAMINER	
ZARLEY LAW FIRM P.L.C. CAPITAL SQUARE 400 LOCUST, SUITE 200 DES MOINES, IA 50309-2350			FETSUGA, ROBERT M	
			ART UNIT	PAPER NUMBER
			3751	

DATE MAILED: 10/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/732,726

Applicant(s)

BALL, WILLIAM T.

Examiner

Robert M. Fetsuga

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 August 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,5-8 and 10 is/are pending in the application.
- 4a) Of the above claim(s) 7 and 8 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,5,6 and 10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10 December 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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1. The proposed drawing correction filed on August 26, 2005 is disapproved as containing new matter. The description of "sealing" and "opening" steps associated with the drain port 28 is not found in the originally filed disclosure. Furthermore, proposed Fig. 8 would not obviate the outstanding Rule 83(a) drawing objection even if the drawing correction was otherwise acceptable. Merely placing the recited "-ing" words in boxes does not define what is involved when performing the claimed acts. However, the change made to Fig. 6 would be acceptable (and now necessary, pg. 7 ln. 10) if separately filed.

2. The drawings are objected to because reference numeral "28" apparently should be --29-- in Fig. 6.

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the "sealing", "charging" and "purging" steps set forth in claim 1, and the "providing" (all occurrences) and "sealing" and "detachably engaging" steps set forth in claim 10, must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior

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version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

3. The amendment filed August 26, 2005 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: The paragraph added to page 9, beginning at line 25, where Fig. 8 is discussed. The description of the "sealing" and "opening" subject matter associated with the drain port 28

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is not found in the originally filed disclosure. Claim 1 also recites this subject matter.

Applicant is required to cancel the new matter in the reply to this Office Action.

4. Claim 10 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The claim recites "detachably engaging" a cap 96 to a lug 92 on a nut 90. Implementation of this subject matter is neither taught by the instant disclosure nor evident to the examiner.

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claim 1, as best understood, is rejected under 35 U.S.C. 103(a) as being unpatentable over Ball '241 and Fritz et al. '531.

The Ball '241 ('241) reference discloses a method (title) comprising: a bathtub 18 including a bottom 26, side walls 22, end walls 24, an overflow port 30, a waste water port 28, and a drain system 32-42; an overflow port diaphragm 64; and a waste water port 28 having a test plug (col. 2 lns. 59-60). Moreover, '241 also discloses cutting open the diaphragm (col. 3 lns. 2-5). Therefore, '241 teaches all claimed elements except for the test plug being a cut open diaphragm.

Although the test plug of the '241 drain system does not include a cut open diaphragm, as claimed, attention is directed to the Fritz et al. '531 (Fritz) reference which discloses an analogous drain system which further includes a test plug (col. 1 lns. 11-13) having a diaphragm (col. 4 lns. 34-41).

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Therefore, in consideration of Fritz, it would have been obvious to one of ordinary skill in the drain system testing art to associate a diaphragm with the '241 test plug in order to enable quick and easy removal. Furthermore, '241 teaches cutting as one acceptable method of removing such a diaphragm as noted supra.

7. Claims 5 and 6, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over '241 and Fritz as applied to claim 1 above, and further in view of Francisco.

Although the drain system of the '241 bathtub does not include a threaded portion and lock washer, as claimed, attention is directed to the Francisco reference which discloses an analogous bathtub which further includes a drain system 102 having a threaded portion 48 and lock washer 52. Therefore, in consideration of Francisco, it would have been obvious to one of ordinary skill in the bathtub art to associate a threaded portion and lock washer with the '241 drain system in order to facilitate securement.

8. Claim 10, as best understood, is rejected under 35 U.S.C. 103(a) as being unpatentable over Lewis, Fritz and Oropallo et al. The Oropallo et al. reference is considered prior art under 102(e) with respect to the filing date of the instant CIP application.

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The Lewis reference (Fig. 3a) discloses a method (claim 19) comprising: a bathtub 30 including bottom, side and end walls (illustrated), an overflow port (receiving 23), and a drain system 11; and an overflow fitting 20 including an upper end portion having threads 23, a lip (illustrated), and a nut 21. Therefore, Lewis teaches all claimed elements except for the overflow fitting including a diaphragm and cap.

Although the overflow fitting of the Lewis drain system does not include a diaphragm, as claimed, attention is directed to the Fritz reference which discloses an analogous drain system which further includes an overflow fitting 12 having a diaphragm 15. Therefore, in consideration of Fritz, it would have been obvious to one of ordinary skill in the drain system testing art to associate a diaphragm with the Lewis overflow fitting in order to facilitate testing.

Although the overflow fitting of the Lewis drain system does not include a cap, as claimed, attention is directed to the Oropallo et al. (Oropallo) reference which discloses an analogous drain system which further includes an overflow fitting 11 having a cap 10. Therefore, in consideration of Oropallo, it would have been obvious to one of ordinary skill in the drain system art to associate a cap with the Lewis overflow fitting in order to conceal same.

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9. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

10. Claim 10, as best understood, is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,637,050. Although the conflicting claims are not identical, they are not patentably distinct from each other because the pending claims generally recite (in "-ing" format) the inherent functions associated with the structure of the patented claims, to the extent the "detachably engaging" step in pending claim 10 is equivalent to the "detachably encased" function of patent claim 1.

11. Applicant's arguments with respect to claims 1 and 10 have been considered but are moot in view of the new ground(s) of rejection.

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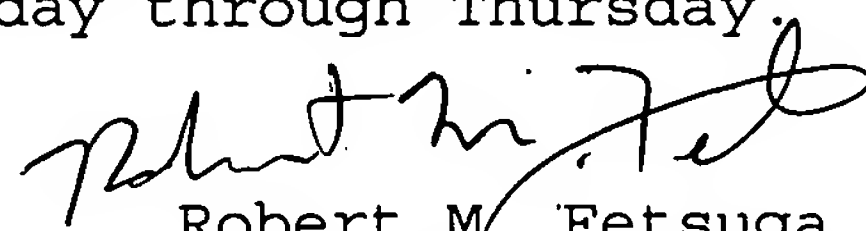
12. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

13. The grounds of rejection have been reconsidered in light of applicant's arguments, but are still deemed to be proper.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

14. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886 who can be most easily reached Monday through Thursday.


Robert M. Fetsuga
Primary Examiner
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